## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented for Review | 2 |
| Constitutional Provisions Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 10 |
| Appendix A | 1a |
| Appendix B | 3a |
| Appendix C | 4a |


## INDEX TO AUTHORITIES

**Cases:**


| | |
|---|---|
| Billingsley v United States, 274 F 86 (1921) | 6 |
| Carlton v United States, 198 F2d 795, 798 (1952) | 5 |
| Etting v Bank of the United States, 24 US [Wheat] 59, 78, 6 L Ed 419, 423 (1826) | 6 |
| Hansford v United States, 303 F2d 219, 224-226 (1962) | 7,10 |
| Heath v United States, 169 F2d 1007, 1010 (1948) | 5 |
| Hill v United States, 328 F2d 988 (1964) | 7 |
| Kadis v United States, 373 F2d 370, 373 (1967) | 5, 7 |
| Kivette v United States, 230 F2d 749, 754 (1956) | 5 |

Page

Mattson v United States, 7 F2d 427 1925)..... 6, 7

McCray v Illinois, 386 US 300 (1967)..... 9, 10

McMillan v United States, 363 F2d 165 (1966).... 8

Neill v United States, 225 F2d 174, 178-180 (1955) 6

Pulido v United States, 425 F2d 1391, 1394 (1970). 7

Roviaro v United States, 353 US 53 (1957)..... 9, 10

Rocha v United States, 401 F2d cert. den. 393 US 1103 (1968) ..... 10

Rugendorf v United States, 376 US 528 (1964) 9

Schacht v United States, 398 US 58 (1970)..... 11

Sorrells v United States, 287 US 434, 451 (1932) 8

Taglianetti v United States, 394 US 316 (1969)... 11

Trice v United States, 211 F2d 513, 516 (1954).... 5, 7

United States v Abdallah, 149 F2d 219, 222..... 5

United States v Catanzaro, 407 F2d 998, 1001 (1969). ..... 5, 7, 8

United States v Collier, 313 F2d 157, 159-160 (1963) ..... 7

United States v DeVore, 432 F2d 1069, 1071..... 5

United States v Johnson, 439 F2d 882 (1971).... 8

United States v Johnston, 426 F2d 112 (1970).... 7

United States v Prieto-Olivas, 419 F2d 149, 151 (1969) ..... 5

United States v Robinson, 446 F2d 562 (1971) 5

United States v Russell — US —; 93 S Ct 1637 (1973) ..... 7

| | Page |
|---|---|
| Waker v United States, 344 F2d 795, 797 (1965) | 6, 7 |
| Washington v United States, 275 F2d 687, 690 (CA 5, 1960) | 7 |
| Whiting v United States, 321 F2d 72, 76-77 (1963) | 5, 7 |

**United States Constitution:**

| | |
|---|---|
| Amendment 5 | 3 |
| Amendment 6 | 3 |

**Other Authorities:**

| | |
|---|---|
| 21 USC §841 | 3 |
| 28 USC 1254 | 2 |
| Webster's New Dictionary of Synonyms (1968) 430 | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No.

SANDRA HALLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Defendant.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sandra Haller prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on April 25, 1973.

## OPINIONS BELOW

The District Judge did not render an Opinion. The Opinion of the Court of Appeals is reported at 477 F2d 453. It is printed as Appendix A, *infra.*

## JURISDICTION

The Judgment of the Court of Appeals was entered on April 25, 1973. (Appendix B, *infra).* A timely Petition for Rehearing was denied on May 31, 1971 (Appendix C, *infra).* Jurisdiction is conferred upon this Court by 28 USC 1254. This Petition is out of time as explained in the Reasons For Granting The Writ.

## QUESTIONS PRESENTED FOR REVIEW

I.

If a Defendant in a Federal criminal prosecution raises the defense of entrapment may the government show that he had a prior disposition to commit crime by introducing hearsay tending to prove the commission of other offenses by the Defendant and the Defendant's bad reputation in the community?

II.

If a government agent is allowed to testify as to statements made to him by informers concerning past offenses by the Defendant, is the Defendant, on demand at trial, entitled to the names of the persons who were the source of the hearsay?

## CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment 5, provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Amendment 6 provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

## STATEMENT OF THE CASE

At her trial for possession of heroin with intent to distribute it,[1] Petitioner raised the issue of entrapment by cross-examination of the agent and by her own testimony.

Petitioner was a 21 year old heroin addict. She had never before been arrested. Separated from her husband, she and her small daughter were living with a man she had known for about a month.

Petitioner delivered 2.3 grams of heroin to a BNDD[2] agent for Fifty Dollars. The agent had been introduced to her by an informer.

According to Petitioner, she was told that the agent's wife was an addict badly in need of heroin. "Because I was a heroin addict, I know what it is like to be sick and I felt sorry for her". Petitioner also testified that she had

---

[1] 21 USC 841.

[2] Federal Bureau of Narcotics and Dangerous Drugs.

never sold narcotics before and her only dealings in it were purchases for her personal use.

In rebuttal, the government called a local police officer who testified over objection:

> An informant or several informants have given my department and me in particular information concerning Sandra Haller and the gentleman she is living with . . . I was approached and told that heroin was being dealt from the apartment during the day and night, at all hours of the day and night; a lot of traffic in and out of the apartment, both black and white people . . . the Ft. Lauderdale Police Department informed me that their informant had also stated that Haller and Ball were both dealing in heroin from the apartment. From our own police department and records clerk who lived very close to the Hallers and Ball also advised me that the neighborhood was buzzing with rumors and people talking about the apartment.

Petitioner's counsel asked that the local police officer identify the informants who gave information concerning Petitioner. The police officer asserted that he believed the safety of the informants would be endangered if their identity was disclosed and consequently the Court declined to require him to name them.

The case was submitted to the jury under instructions which were not challenged in the Court of Ap etitioner was convicted and sentenced forthwith term of three years in prison.

## REASONS FOR GRANTING THE WRIT

In *United States* v *Russell*....US....; 93 S Ct 1637 (1973), this Court re-examined the rationale of the defense of entrapment. This Petition does not ask the Court to re-travel that ground. On the contrary, the conclusion there marks the origin of our issue.

> Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime. 93 S Ct at 1641.

Whether the focus is broad enough to include the proable cause with which the officers acted in testing the defendant's predisposition to crime has not been a matter of agreement among the Circuits. In the First,[3] Second,[4] Third,[5] Fourth,[6] and Fifth[7] Circuits probable cause need not be shown to justify the actions of the officers in offering a defendant an opportunity to commit a crime. To the contrary, the Ninth[8] and Tenth[9] Circuits hold that once entrapment is an issue the government must show that the officers had reasonable grounds for believing that the accused was engaged in criminal activity.

---

[3] *Whiting v United States*, 321 F2d 72, 76-77 (1963); *Kadis v United States*, 373 F2d 370, 373 (1967).

[4] *United States v Abdallah*, 149 F2d 219, 222, fn 1.

[5] *United States v Catanzaro*, 407 F2d 998, 1001 (1969).

[6] *United States v DeVore*, 423 F2 d 1069, 1071.

[7] *Kivette v United States*, 230 F2d 749, 754 (1956), *United States v Prieto-Olivas*, 419 F2d, 149, 151 (1969).

[8] *Carlton v United States*, 198 F2d 795, 798 (1952); *Trice v United States*, 211 F2d 513, 516 (1954).

[9] *Heath v United States*, 169 F2d 1007, 1010 (1948).

In the Eighth Circuit probable cause need not be shown but may be admissible on the question of the predisposition of the Defendant.[10]

If resolution of the foregoing conflict were all this Petition seeks, we might be hard put to justify intrusion upon this Court's busy schedule especially since the Court still remains so closely divided on the rationale of the defense of entrapment.[11] But the conflict runs much deeper.

The basic issue of entrapment is the predisposition of the defendant rather than the probable cause of the officers to act. The First Circuit has been extremely careful in keeping the two concepts separate.

> [The Court] charged the jury that the prosecution could establish the defendant's predisposition by showing that the agent knew that he was predisposed to commit the crime, either from "personal knowledge or from information from an established authority that is to be believed". This was either a total failure to charge on the more basic issue of predisposition as distinguished from probable cause, or a charge that on this basic issue hearsay could be considered.
> *Waker* v *United States*, 344 F2d 795, 797 (1965).

> Solicitation to commit a crime does not of itself involve constitutional rights, and it is not comparable to the arrest of person or to the invasion of premises. Furthermore, if the existence of probable

---

[10] *Neill v United States*, 225 F2d 174, 178-180 (1955). [But compare *Mattson v United States*, 7 F2d 427 (1925). This may also be the Sixth Circuit rule. *Billingsley v United States*, 274 F 86 (1921).

[11] "No attempt will be made to analyze [the cases] or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled . . ." *Etting v Bank of the United States*, 24 US [11 Wheat.] 59, 78, 6 L Ed 419, 423 (1826).

> cause, normally shown by hearsay evidence, is to determine who may and who may not be solicited, a defendant's exposure to temptation may depend upon circumstances over which he has no control, and for which he was in no way responsible. *Whiting* v *United States*, 321 F2d 72, 76 (1963).

Only two Circuits, the Fifth[12] and Ninth,[13] allow uncorroborated hearsay and "reputation" testimony to establish the defendant's predisposition.[14]

The First,[15] Third,[16] probably the Seventh[17] and Eighth Circuits,[18] do not allow such testimony.

The District of Columbia has its own rule that on the issue of predisposition of the defendant, prior offenses cannot be testified to even by an eye witness unless there is substantial corroboration.[19]

---

[12] The opinion below, Appendix A, *infra; Hill v United States*, 328 F2d 988 (1964); *United States v Robinson*, 446 F2d 562 (1971). In the latter case, the Court indicated that the hearsay also bore on the question of probable cause. To the same effect see *Washington v United States*, 275 F2d 687, 690 (CA 5 1960).

[13] *Pulido v United States*, 425 F2d 1391, 1394 (1970). Here, the Court misread its earlier holding in *Trice*, *supra*, fn 8 that hearsay was admissible to prove the probable cause of the officers.

[14] The Court below describes the issue as being the "prior disposition" of the defendant rather than his predisposition. This is probably careless writing rather than expression of a new concept. Predisposition refers to a current state of mind or predilection. Cf. *Webster's New Dictionary Of Synonyms* (1968) 430, which discriminates incline, bias, dispose and predispose.

[15] *Whiting*, fn 3, *supra; Kadis*, fn 3, *supra;* and *Waker*, *supra*, p. 6.

[16] *Catanzaro*, fn 5, *supra*.

[17] *United States v Collier*, 313 F2d 157, 159-160 (1963) [Dictum]. Cf *United States v Johnston*, 426 F2d 112 (1970) where the Seventh Circuit follows the District of Columbia rule.

[18] Cf *Mattson v United States*, 7 F2d 427 (1925).

[19] *Hansford v United States*, 303 F2d 219, 224-226 (1962).

Hearsay is usually admitted on the issue of probable cause. It is hardly necessary to cite the search warrant cases and the search-following-arrest cases of this Court. But the hearsay is sifted and evaluated by a judicial officer rather than a jury. Although the judicial officer is engaging in a fact-finding function, he is not deciding the ultimate question, the guilt or innocence of the defendant. He is acting before trial on a motion to suppress or in issuing a warrant.

If we allow a jury to determine probable cause based upon hearsay, there is a grave danger that the jury will improperly consider the hearsay in determining guilt. Even the Fifth Circuit recognizes this when its attention is not diverted by the entrapment issue. *United States* v *Johnson,* 439 F2d 882 (1971);[20] *McMillan* v *United States,* 363 F2d 165 (1966).

One stark conflict stands out in the confusion of opinions we have cited. For whatever reason assigned, in the Fifth, Ninth and Tenth Circuits, if a defendant interposes the defense of entrapment, he gives the government the right in rebuttal to attack the defendant with hearsay, rumor and street gossip to show that the defendant is a bad person or has committed crimes in the past for which he has not been brought to justice. On the contrary, in the First, Third, Seventh, Eighth and District of Columbia Circuits such testimony is inadmissible. The conflict relates not to the scope of the inquiry but the quality of the evidence. Can a "searching inquiry"[21] be based upon rumor and street gossip?

---

[20] Citing and relying upon the Third Circuit decision in *Catanzaro, supra,* which the Fifth Circuit refuses to follow in entrapment cases.

[21] . . . if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition. . . . *Sorrells v United States,* 287 US 434, 451(1932).

This is the conflict which should be resolved in this Court.

## II.

*Rugendorf* v *United States*, 376 US 528 (1964) held that the government could withhold the identity of an informer who furnished the information to obtain the search warrant. The defendant there did not assert that the identity of the informer was necessary to defend himself at trial on the merits. *McCray* v *Illinois*, 386 US 300 (1967) dealt with nondisclosure of informants at a preliminary hearing to determine probable cause for arrest and search. It was decided under the Fourteenth Amendment. *Roviaro* v *United States*, 353 US 53 (1957) held that an accused was entitled to the name of an informer who witnessed the crime charged in the indictment.

None of these cases precisely covers the fact situation which we tender to the Court. The city police officer said that the defendant's reputation and the reputation of the apartment in which she lived for being a center of narcotics activity was based upon statements made by four unidentified informants. It was utterly impossible to cross-examine the officer as to either the source of the information or its contents and accuracy. In effect, in violation of the confrontation clause, defendant had her guilt turn upon the testimony of four nameless and faceless witnesses.[22]

---

[22] At trial defense counsel stated:

> My client has categorically stood upon this stand and denied that she was involved in the sale of narcotic drugs and for her now to be impaled upon the testimony of this officer and not to be permitted to seek out these people to try to ascertain the truthfulness of the testimony or exactly how it came about would be denying to her a fair trial and would also be denying to her an opportunity to seek out those who are indirectly her accusers, and they are depriving her of her Sixth Amendment Rights [Trial transcript 86].

The rule of the Fifth Circuit is contained in *Rocha* v *United States,* 401 F2d 529, *cert. den.* 393 US 1103 (1968). There, under a similar fact situation, the Court held:

> The informer who gave this report to the agent was not a witness to the alleged offense as in [*Roviaro*]. The Appellant's situation more nearly resembles that presented in [*McCray*] in which it was held that the identity of the informer did not have to be disclosed on an issue of probable cause.

Since the issue of probable cause in *McCray* was being determined in a pre-trial hearing and the jury in no way was getting the information contained in the hearsay statements, it seems clear that *McCray* has no application. Here, of course, the jury heard the city detective relate the hearsay statements which were to be considered by them in determining whether the defendant was predisposed to commit the crime charged in the indictment.

The ruling below conflicts with the District of Columbia rule that if evidence of other offenses is going to be introduced to show the defendant's predisposition to crime, such evidence must be strongly corroborated. *Hansford* v *United States,* 303 F2d 219.

## CONCLUSION

Petitioner's present counsel was not retained until July 26, 1973, and then only in connection with a matter unrelated to this Petition. His first opportunity to examine the file was on July 27, 1973. Believing that the issues presented by this record are important enough for review by the Supreme Court, counsel moved with all dispatch to prepare this Petition. It will be filed in typewritten form on August 2, 1973, along with the docketing fee and the printed Petition will be filed on Monday, August 6th, 1973.

Although the Petition is out of time by approximately five weeks, the court does have the jurisdiction to consider it. *Taglianetti* v *United States,* 394 US 316 (1969); *Schacht* v *United States,* 398 US 58 (1970) [a delay of 101 days in filing the Petition].

The Petition tenders to the Court two closely related questions which have never been considered by the Court and upon which there are considerable diverse views in the Courts below. The Petition for Certiorari should be granted to resolve the conflict.

VARON, STAHL and KAY, P.A.
and PHILIP A. GILLIS
By: Philip A. Gillis, Esq.
*Attorneys for Petitioner*
5th floor
American Title Building
Detroit, Michigan 48226
968-8210

Dated: August 1, 1973.

## APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2734

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDDIE BROOKS, WILLIE LUMDY
and SANDRA HALLER,
Defendants-Appellants.

---

*Appeals from the United States District Court for the Southern District of Florida*

---

(April 25, 1973)

---

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

PER CURIAM: Eddie Brooks, Willie Lumdy, and Sandra Haller appeal from their conviction for possession and distribution of a narcotic controlled drug, heroin, in violation of 21 U.S.C. § 841. We affirm.

The appellants raise several contentions. Appellant Haller contends that the trial court erred in admitting into evidence certain statements concerning her reputation. At trial, Haller took the stand and testified that she was en-

trapped. The trial court later allowed a government witness to testify that several unnamed informants told him that Haller had been involved in other narcotic transactions. Haller argues that the agent's testimony was inadmissible hearsay and that the names of the informers should have been revealed. We disagree. In *Rocha* v *United States,* 5 Cir. 1968, 401 F2d 529, *cert. den.* 393 U.S. 1103, we held that when entrapment is asserted as a defense, hearsay is admissible to show prior disposition to commit an offense charged in the indictment and that the government is not required to disclose the names of the informants.

Haller also contends that the evidence established that she was entrapped. Brooks contends that the trial court erred (1) in refusing to give a requested jury instruction as to the government's burden in proving entrapment and (2) in ruling that Brooks was not entrapped at a matter of law. Lumdy contends (1) that the jury selection plan, allegedly excluding Latin-Americans and persons between 21 and 25, denied his right to a jury of his peers; (2) that Congress exceeded its power under the commerce clause in enacting 21 U.S.C. § 841(a)(1); (3) that the trial court erred in denying his motion for severance; (4) that there was insufficient evidence to show for the jury to find him guilty of the offenses charged; and (5) that there was a failure to republish Schedule I as required by 21 U.S.C. § 812.

We find no merit in any of these contentions. The decision of the district court must therefore be affirmed.

*Affirmed.*

## APPENDIX B

## PROPOSED JUDGMENT*

No. 72-2734

*Appeal from the United States District Court for the Southern District of Florida*

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges.

This cause came on to be heard on the transcript of the record of the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

April 25, 1973

Issued as Mandate:

(As to Sandra Haller only)

---

*Counsel is advised that as of August 2, 1973, this judgment, because of a clerical error, has not yet been entered.

## APPENDIX C

## ORDER

---

No. 72-2734

---

*Appeal from the United States District Court for the Southern District of Florida*

---

ON PETITION FOR REHEARING

---

(May 31, 1973)

Before BROWN, Chief Judge, WISDOM and AINSWORTH, Circuit Judges

PER CURIAM: It is ordered that the Petition for Rehearing filed on behalf of Sandra Haller in the above entitled and numbered cause be and the same is hereby denied.

Signed by all three judges